I Bhd v K A Sandurannehru a/l Ratnam & Anor

HIGH COURT (IPOH) — ORIGINATING MOTION NO 25–25 OF 2001
BALIA YUSOF JC
5 FEBRUARY 2004

Labour Law — Industrial Court — Procedure — Standard of proof — Industrial Court applied stringent test in respect of evidence adduced by parties — Whether Industrial Court should have merely considered if applicant had reasonable grounds to dismiss first respondent based on evidence produced before it

The first respondent, an employee of the applicant, was caught by the security guard when he took out 1.5 litres of thinner contained in a bottle. The first respondent was subsequently charged with deliberately and knowingly taking out the 1.5 litres of thinner without authorization or prior approval. A domestic inquiry was held and the first respondent was found guilty as a result of which his services with the applicant was terminated. A reference under s 20(2) of the Industrial Relations Act 1967 was made. The Industrial Court concluded that the first respondent's dismissal was without just cause or excuse, unreasonable, not in good conscience and excessively harsh. This was the applicant's application for an order of certiorari to set aside or quash the award of the Industrial Court on the ground that the Chairman of the Industrial Court was wrong in law in treating the proceedings before the Industrial Court as a criminal proceeding and in applying a very stringent test in respect of the evidence adduced by the parties. The applicant further contended that the Industrial Court had committed an error of law when it took into account irrelevant considerations in coming to its conclusion, namely, the type of thinner taken by the first respondent.

Held, allowing the appeal:

(1) In deciding whether the dismissal was without just cause, the Industrial Court had to consider on the evidence produced before it, whether the applicant had reasonable grounds to dismiss the first respondent (see para 8).

(2) The Industrial Court was not a court of law where technicalities of the law were its prime consideration. In determining the misconduct of the employee, the Industrial Court should not have proceeded as if it was exercising the function of a criminal court. In the instant case, the Industrial Court had failed to observe this and on this ground alone, this court was prepared to issue an order of certiorari to quash the said decision. The Industrial Court had erred and misdirected itself on the issue of burden of proof and had committed an error of law (see paras 10 and 11).

(3) The Industrial Court had also committed an error of law in considering the issue as to the type of thinner that was allegedly taken out by the first respondent. It was irrelevant for the purpose of the charge against the first respondent what the thinner was used for. The material issue before the Industrial Court should be the taking out of the thinner without authorization and there was clear evidence to that effect as found by the Industrial Court itself (see para 14).

[**Bahasa Malaysia summary**

Responden pertama, seorang pekerja pemohon, telah ditahan oleh pengawal keselamatan semasa beliau mengambil 1.5 liter pencair di dalam satu botol. Responden pertama telah dituduh dengan sengaja dan dengan penuh erti mengambil 1.5 liter pencair itu tanpa mendapat izin atau kebenaran terdahulu. Satu siasatan dalaman telah diadakan dan responden telah didapati bersalah dan ini mengakibatkan perkhidmatan beliau dengan pemohon ditamatkan. Satu rujukan di bawah s 20(2) Akta Perhubungan Perushaan 1967 telah dibuat. Mahkamah Perusahaan telah membuat keputusan bahawa pemecatan responden pertama dibuat tanpa sebab atau alas an yang adil, tidak munsabah dan bukan dengan kemurnian dan terlalu keras. Ini adalah permohonan pemohon untuk satu perintah certiorari untuk membatalkan award Mahkamah Perusahaan pada alasan bahawa Pengerusi Mahkamah Perusahaan terkhilaf di sisi undang-undang dengan menganggap prosiding di hadapan Mahkamah Perusahaan itu sebagai prosiding jenayah dan dengan memakai ujian yang ketat berkait dengan keterangan ang dikemukakan oleh parti-parti. Pemohon telah berhujah seterusnya bahawa Mahkamah Perusahaan telah terkhilaf di sisi undang-undang apabila ia membuat pertimbangan yang tidak relevan di dalam keputusannya, iaitu, mengenai jenis pencair yang diambil oleh responden pertama.

Diputuskan, membenarkan rayuan itu:

(1) Di dalam memutuskan sama ada pemecatan itu adalah tanpa sebab dan alasan yang adil, Mahkamah Perusahaan mesti mempertimbangkan keterangan di hadapannya, sama ada pemohon mempunyai alasan yang munasabah untuk memecat responden pertama (lihat perenggan 8).

(2) Mahkamah Perusahaan bukan mahkamah yang membuat keteknikan undang-undang pertimbangan utamanya. Di dalam menentukan salah laku pekerja itu, Mahkamah Perusahaan tidak patut meneruskan prosiding itu seperti menjalankan fungsi mahkamah jenayah. Di dalam kes ini, Mahkamah Perusahaan gagal mematuhi ini dan pada alasan ini, mahkamah bersedia mengeluarkan perintah certiorari untuk membatalkan keputusan itu. Mahkamah Perusahaan terkhilaf dan salah arahkan dirinya pada isu beban bukti dan telah terkhilaf di sisi undang-undang (lihat perenggan 10 dan 11).

(3) Mahkamah Perusahaan telah terkhilaf di sisi undang-undang semasa mempertimbangkan isu jenis pencair yang dikatakan diambil oleh responden pertama. Ia tidak relevan untuk tujuan pertuduhan terhadap responden pertama apa kegunaan pencair itu. Isu yang material dihadapan Mahkamah Perusahaan adalah pengambilan pencair tanpa kebenaran dan terdapat keterangan yang jelas berkenaan itu seperti yang diputuskan oleh Mahkamah Perusahaan (lihat perenggan 14).]

Notes

For cases on procedure in the Industrial Court, see 8(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1380–1390.

For procedure at hearing at the Industrial Court, see 7 *Halsbury's Laws of Malaysia*, para [120.113].

Cases referred to

British Home Stores Ltd v Burchell (1978) ILR 378 (refd)
Council of Civil Service Union & Ors v Minister for the Civil Service [1985] AC 374 (refd)
Ferodo Ltd v Barnes (1976) ICR 439 (refd)
Harpers Trading (M) Sdn Bhd v National Union of Commercial Workers [1991] 1 MLJ 417 (refd)
Harris Solid State (M) Sdn Bhd v Bruno Gentil s/o Pereira & Ors [1996] 4 MLJ 489 (refd)
Telekom Malaysia Kawasan Utara v Krishnan Kutty a/l Sanguni Nair & Anor [2002] 3 MLJ 129 (refd)
Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd and another appeal [1995] 2 MLJ 753 (refd)
Mak Weng Kit v Reed Exhibitions Sdn Bhd [2000] 1 MLJ 715 (refd)
Minister of Home Affairs v Persatuan Aliran Kesedaran Negara [1990] 1 MLJ 351 (refd)
Nadarajah & Anor v Golf Resort (M) Bhd [1992] 1 MLJ 506 (refd)
Regina v Deputy Industrial Injuries Commissioner, ex p Moore [1965] 1 QB 456 (refd)
Syarikat Kenderaan Melayu Kelantan Bnd v Transport Workers' Union [1995] 2 MLJ 317 (refd)

Legislation referred to

Industrial Relations Act 1967 s 20(2)

TM Varughese (TM Varughese & Co) for the applicant.
Fathima Idris (Idris & Associates) for the respondent.

Balia Yusof JC:

[1] By this application (encl 9) the applicant, a company is seeking for an order of certiorari to set aside or quash the award of the Industrial Court made on the 30 August 2001.

[2] The first respondent was in the employment of the applicant company and at the time of his dismissal he held the post of an assistant line captain and his last drawn salary was RM1439. On 22 September 1999 the respondent was caught by the security guard taking out 1.5 litres of thinner contained in a bottle and he was subsequently charged with deliberately and knowingly taking out 1.5 litres of thinner without authorization or prior approval before a domestic inquiry which was held on 6 October 1999. The first respondent was found guilty as a result of which his services with the applicant was terminated on 7 October 1999. A reference under s 20(2) of the Industrial Relations Act 1967 was made vide Mahkamah Perusahaan No. 11 (10)/4-449/00 and by an award handed down dated 30 August 2001 the Industrial Court made an order that the applicant pay the first respondent a sum of RM54,682 after having concluded that the applicant has dismissed the first respondent not only without just cause or excuse but it was also unreasonable, not in good conscience and excessively harsh. Against this order, the applicant has filed the present application before this court for an order of certiorari to quash the said decision of the Industrial Court.

[3] The applicant contended that the Industrial Court has committed an error of law in its approach of dealing with the matter with regard to the issue of burden of proof and the standard of proof that ought to be adopted in proceedings before the Industrial Court. Although the applicant has enumerated extensive grounds in support of its motion, I find that in a nutshell it is essentially the issue of standard of proof that forms the basis of this application. It is contended by the applicant that the learned Chairman was wrong in law in treating the whole proceedings before the Industrial Court as a criminal proceeding and applying a very stringent test in respect of the evidence to be adduced by the parties before it. In my view the numerous points highlighted by the applicant in encl 13 which sets out the grounds supporting the application points merely toward the direction of criticizing the Chairman's evaluation and appreciation of the evidence adduced by the applicant in establishing the charge against the first respondent.

[4] In support of his submission, counsel for the applicant relied on the case of *Telekom Malaysia Kawasan Utara v Krishnan Kutty a/l Sanguni Nair & Anor* [2002] 3 MLJ 129 which held that in hearing a claim of unjust dismissal where the employee was dismissed on the basis of an alleged criminal offence such as theft of company property, the Industrial Court is not required to be satisfied beyond a reasonable doubt that such an offence was committed. The standard of proof applicable is the civil standard, ie proof on a balance of probabilities which is flexible so that the degree of probability required is proportionate to the nature and gravity of the issue. The Court of Appeal further held that the Industrial Court should not be burdened with technicalities concerning the different standard of proof or the rule of evidence or procedure that is applied in a court of law. In holding that the applicant has failed to prove dishonest intention and further stating that the applicant has not been able to discharge their evidential burden in failing to prove every element of the charge, the Industrial Court has adopted and applied a wrong standard of proof that is required of the applicant. The function of the Industrial Court is best described by the Federal Court in the case of *Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd and another appeal* [1995] 2 MLJ 753 which held at p 762:

> On the authorities, we were of the view that the main and only function of the Industrial Court in dealing with a reference under section 20 of the Act (unless otherwise lawfully provided by the terms of the reference) is to determine whether the misconduct or irregularities complained of by the management as the grounds of dismissal were in fact committed by the workman, and if so, whether such grounds constitute just cause or excuse for the dismissal.

[5] Further, in *Harris Solid State (M) Sdn Bhd v Bruno Gentil s/o Pereira & Ors* [1996] 4 MLJ 489 Gopal Sri Ram JCA remarked that, at p 510:

> Further, s 30(5) of the Act imposes a duty upon the Industrial Court to have regard to the substantial merits of a case rather than to technicalities. It also requires the Industrial Court to decide a case in accordance with equity and good conscience.

[6] A similar tone was earlier echoed by Eusoff Chin J (as he then was) in *Nadarajah & Anor v Golf Resort (M) Bhd* [1992] 1 MLJ 506 at p 511:

A It is therefore to be observed that in view of the provisions of s 30(5) of the Act, the Industrial Court must act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form. Technical rules such as estoppel, limitation, laches, acquiescence, etc (unless otherwise provided for in the Act) have no place in industrial adjudication and they should not be allowed to be invoked for defeating claims which are just and proper.

B **[7]** On the nature of the evidence that might be accepted by a tribunal like the Industrial Court, Diplock LJ in *Regina v Deputy Industrial Injuries Commissioner, ex p Moore* [1965] 1 QB 456 at p 488 stated:

These technical rules of evidence, however, form no part of the rules of natural justice. The requirement that a person exercising quasi-judicial functions must
C base his decision on evidence means no more than it must be based upon material which tends logically to show the existence or non existence of facts relevant to the issue to be determined, or to show the likelihood or unlikelihood of the occurrence of some future event the occurrence of which would be relevant. It means that he must not spin a coin or consult an astrologer, but he may take into account any material which, as a matter of reason, has some probative value in the sense
D mentioned above. If it is capable of having any probative value, the weight to be attached to it is a matter for the person to whom Parliament has entrusted the responsibility of deciding the issue.

[8] In deciding whether the dismissal was without just case what the Industrial Court had to consider was merely whether on the evidence produced
E before it the applicant had reasonable grounds in dismissing the first respondent. The test applied in *Ferodo Ltd v Barnes* (1976) ICR 439 states that:

It must be remembered that in dismissing an employee including a dismissal where the reason is criminal conduct, the employer need only satisfy himself at the time of the dismissal, there were reasonable grounds for believing that the offence put against the employee was committed. The test is not whether the employee did it
F but whether the employer acted reasonably in thinking the employee did it and whether the employer acted reasonably in subsequently dismissing him.

[9] And similarly in *British Home Stores Ltd v Burchell* (1978) ILR 378 is was again emphasized that:

In a case where an employee is dismissed because the employer suspects or
G believes that he or she has committed an act of misconduct, in determining whether that dismissal is unfair an Industrial Tribunal has to decide whether the employer who discharged the employee on the ground of the misconduct in question entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time.

H **[10]** On the host of authorities aforementioned, it is clear that the Industrial Court is not a court of law where technicalities of the law should be its prime consideration. On the same token, in determining the misconduct of the employee, the Industrial Court should not have proceeded as if it is exercising the function of a criminal court.

I **[11]** On the facts and circumstances of this case, and to quote Abdul Hamid Mohamad JCA in *Telekom Malaysia Kawasan Utara v Krishnan Kutty Sanguni Nair* (at p 137) 'the Industrial Court should not be burdened with the technicalities regarding the standard of proof, the rules of evidence and

procedure that are applied in a court of law. The Industrial Court should be allowed to conduct its proceedings as a court of arbitration, and be more flexible in arriving at its decision, so long as it gives special regard to substantial merits and decide a case in accordance with equity and good conscience'. The Industrial Court has failed to observe this and on this ground alone, this court is prepared to issue an order of certiorari to quash the said decision. The Industrial Court has erred and misdirected itself on the issue of burden of proof and has committed an error of law.

[12] The applicant further contends that the Industrial Court has committed an error of law in taking to account irrelevant consideration in coming to its conclusion. In this respect it was submitted that the Industrial Court has erred in differentiating the type of thinner that was taken out by the first respondent which in the applicant's contention it matters not what type of thinner was taken out as the subject matter of the charge against the first respondent was the taking out of 1.5 litres of thinner without authorization.

[13] As to errors of law, it has always been held that an inferior tribunal or other decision making authority, whether exercising a quasi-judicial function or purely administrative function, has no jurisdiction to commit an error of law. If an inferior tribunal or other public decision taker does make such error, then he exceeds his jurisdiction. (See *Syarikat Kenderaan Melayu Kelantan Bnd v Transport Workers' Union* [1995] 2 MLJ 317 at p 342). The court of appeal in the said case further said that:

> It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law, for the categories of such an error are not closed. But it may be safely said that an error of law would be disclosed if the decision maker asks himself the wrong question or takes into account irrelevant considerations (what may be conveniently termed an *Anisminic* error) or if he misconstrues the terms of any relevant statute, or misapplies or misstates a principle of the general law.

[14] I am of the view that the Industrial Court has committed an error of law in considering the issue as to the type of thinner that was allegedly taken out by the first respondent. This court is of the view that it is irrelevant for the purpose of the charge against the first respondent what the thinner was used for, be it for mixing paint or for the purpose of cleaning. The material issue before the Industrial Court should be the taking out of the thinner without authorization and there is clear evidence to that effect as found by the Industrial Court itself when it held at p 2 of the award that, 'it is not in dispute that this taking out of the thinner is without the authorization or prior approval of the relevant officers of the company'.

[15] It is certainly not the function of this court to act as a court of appeal when dealing with an application for judicial review. This court may exercise judicial review on ground of a 'illegality', 'irrationality' or on the ground of procedural impropriety (see *Mak Weng Kit v Reed Exhibitions Sdn Bhd* [2000] 1 MLJ 715, *Council of Civil Service Union & Ors v Minister for the Civil Service* [1985] AC 374 and *Minister of Home Affairs v Persatuan Aliran Kesedaran Negara* [1990] 1 MLJ 351). In *Harpers Trading (M) Sdn Bhd v National Union of Commercial Workers* [1991] 1 MLJ 417, the Supreme Court held that, at p 417:

A Judicial review is not an appeal from a decision but a review of the manner in which the decision was made and the High Court is not entitled on an application for judicial review to consider whether the decision itself, on the merits of the facts, was fair and reasonable.

B **[16]** Upon reviewing the manner in which the decision of the Industrial Court was made, I hold that the decision was flawed by the abovementioned reasons and such a decision must not be allowed to stand. In the circumstances, this application is allowed with costs. I further order that the matter be remitted to the Industrial Court to be dealt with accordingly before a different panel.

Appeal allowed.

C Reported by Lim Lee Na

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